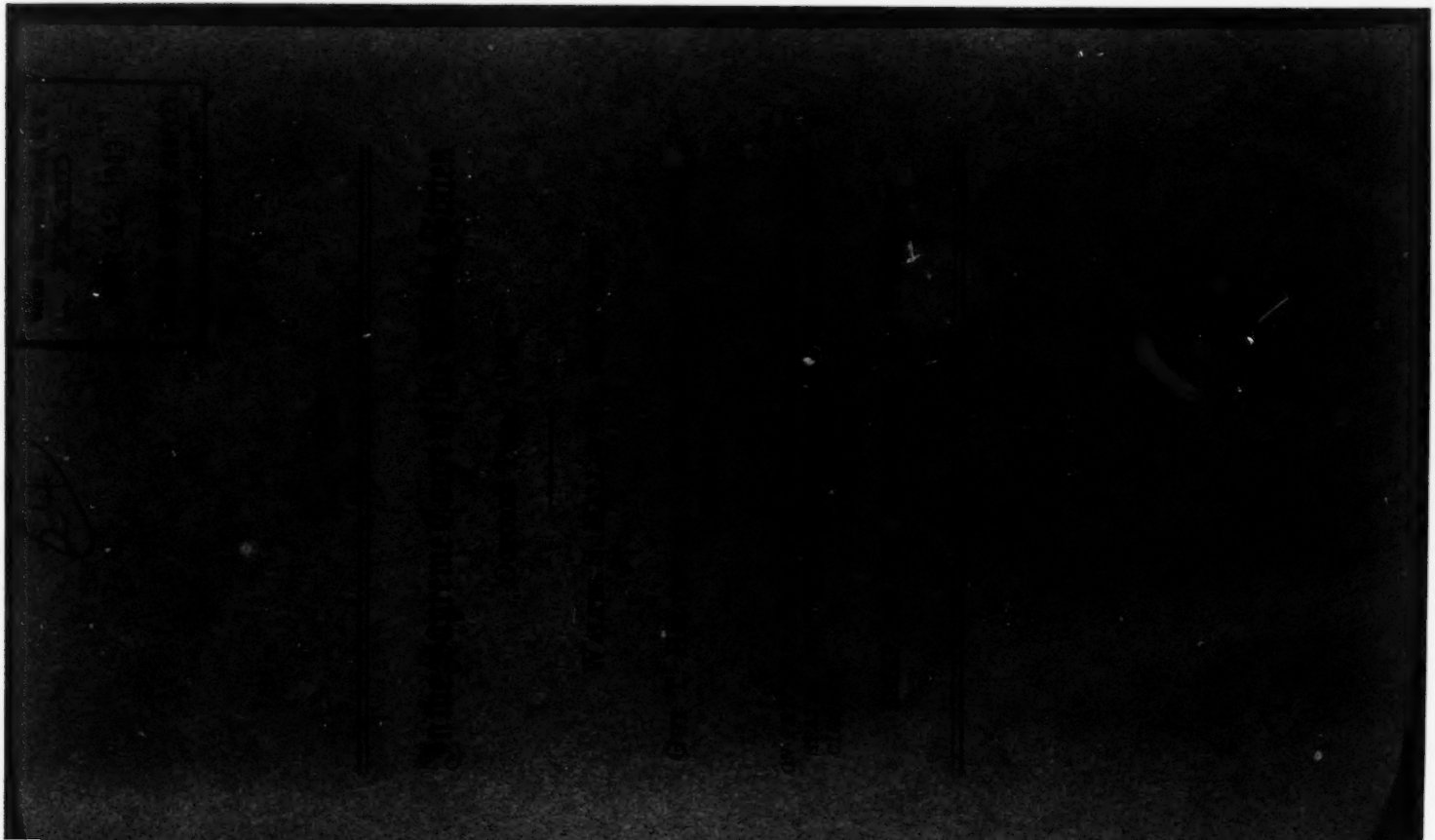




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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 836

WALTER S. HALLIWELL, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 26–36) is reported in 44 B. T. A. 740. The opinion of the Circuit Court of Appeals (R. 48–50) is reported in 131 F. 2d 642.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 17, 1942 (R. 50). The petition for a writ of certiorari was filed March 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1938, pursuant to a divorce decree, the taxpayer transferred to his former wife certain securities which had cost him less than the value at that time of such transfer. Did the taxpayer realize a taxable gain under Sections 111, 112, 113 and 117 of the Revenue Act of 1938?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.
>
> (a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.
>
> (b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.
>
> (c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.
>
> * * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(b) *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 18 months;

66⅔ per centum if the capital asset has been held for more than 18 months but not for more than 24 months;

50 per centum if the capital asset has been held for more than 24 months.

* * * * *

The applicable regulations are Treasury Regulations 101, promulgated under the Revenue Act of 1938, Articles 111–1, 112 (a)–1, 113 (a)–1, 2 and 117–2.

STATEMENT

The following facts were stipulated (R. 16–25) and found by the Board of Tax Appeals (R. 27, 29–30):

Taxpayer, a resident of New York (R. 27) married Lillian de Melinowska on May 31, 1920 (R. 29).

On March 3, 1938, Lillian instituted in the Superior Court of Connecticut an action against taxpayer for divorce, custody of a minor child, and alimony (R. 29).

On March 16, 1938, taxpayer and Lillian entered into a written agreement that if a decree of divorce were granted, Lillian, subject to the approval of the court, was to be awarded the custody of their minor child and also a lump sum, consisting of certain securities and cash specified in a schedule attached to the agreement, as alimony, for her support and maintenance, and for the support, maintenance, and education of their minor child. The parties also agreed that, if taxpayer died pending the action for divorce, the securities and cash specified in the schedule attached to the agreement were to be delivered to Lillian in lieu of any and all statutory and other rights in and to taxpayer's estate. In the schedule attached to the agreement the following securities and cash were specified (R. 29):

Security	Shares	Amount
American Snuff Co. com. at 51¼	180	$9,225.00
American Tobacco com. B at 66¼	545	36,106.25
American Tobacco com. A at 67	2,875	192,625.00
British American Tobacco ordinary pound shares at 26	4,435	115,310.00
Imperial Tobacco ordinary pound shares at 35⅜	1,591	56,281.62
MacAndrews & Forbes Co. com. at 29¾	50	1,487.50
United States Tobacco com. at 32	92	2,944.00
Porto Rican American Tobacco Co. com. A at 2⅜	38	90.25
R. J. Reynolds Tobacco Co. com. B at 38½	1,228	47,278.00
J. S. Young Co. com. at 90	6	540.00
		461,887.62
Cash adjustment		673.38
Total		462,561.00

On March 16, 1938, Lillian executed a release in which she released taxpayer, his executors, administrators, and estate from all of her rights to share in his property at his death (R. 29).

On July 12, 1938, a judgment was entered by the superior court in the divorce action. The court approved the agreement entered into between taxpayer and Lillian and found, *inter alia,* that taxpayer was possessed of property having an approximate value of $1,500,000 and that securities and cash of the approximate value of $462,561 were a reasonable portion of taxpayer's property to be assigned to Lillian in accordance with the terms of the agreement. The court ordered that Lillian was divorced from taxpayer; that she was to have the custody of their minor child; and that on or before July 16, 1938, taxpayer was to transfer to Lillian as alimony, and in full satisfaction of his

obligation for the support of their minor child, the securities and cash, or substitutes therefor, of the approximate value of $462,561, specified in the schedule attached to the agreement. The court further ordered that upon delivery of the specified securities and cash taxpayer was to be discharged of all obligations for the support of Lillian or for the support of their minor child. On or about July 16, 1938, the specified securities and cash were delivered to Lillian. The cost of the specified securities to taxpayer was $160,038.97. At the time of their delivery to Lillian the value of the specified securities was $461,887.62. (R. 29–30.)

The Commissioner determined that $301,848.65, being the difference between the cost of the securities and their value at date of delivery to Lillian, constituted capital gain of which 50 per cent should be taken into account in computing the net income of the taxpayer for 1938 (R. 12). The Board of Tax Appeals held this erroneous (R. 33–36) but the court below reversed (R. 48–50).

ARGUMENT

In holding that the taxpayer realized taxable gain on the transfer of securities, pursuant to a decree of divorce, to his former wife, the court below followed the case of *Commissioner* v. *Mesta,* 123 F. 2d 986, where the Third Circuit reached the same conclusion upon substantially similar

facts. This Court denied the application for certiorari in that case, 316 U. S. 695, and we submit that the instant petition should be denied for the same reasons as set forth in our brief in opposition in that case. Since that brief was filed (May 25, 1942), no conflict has developed and certainly there is no conflict with any of the authorities cited by the taxpayer in the petition for certiorari. The regulation to which he refers (Pet. 7)[1] is largely a repetition of the statutory language (Sec. 111 (a) and (b) of the Revenue Act of 1938, *supra*) and plainly is not inconsistent with the instant decision. As pointed out by the court below (R. 49) the cases of *Lyon* v. *Lyon,* 21 Conn. 185, and *Scott* v. *Scott,* 83 Conn. 634, relied upon by the taxpayer (Pet. 7–8) do not support the contention accepted by the Board of Tax Appeals (R. 34–35) that the instant transaction amounted to a mere division of property between husband and wife which would not result in any gain or loss. The securities in question were

[1] Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 111–1. *Computation of gain or loss.*—Except as otherwise provided, the Act regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property which is received. * * *

* * * * *

Halliwell's own individual property and prior to the assignment he could have sold them or given them away without her consent. *Newman* v. *Dore,* 275 N. Y. 371, 376–377; *Krause* v. *Krause,* 285 N. Y. 27, 31; see also opinion of the court below and authorities there cited. (R. 49.) In the circumstances the transaction was sufficient analogous to a sale to justify treating it as such for income tax purposes. Cf. *Kenan* v. *Commissioner,* 114 F. 2d 217 (C. C. A. 2d); *International Freighting Corp.* v. *Commissioner* (C. C. A. 2d), decided March 6, 1943 (C. C. H., par. 9334); *Rogers* v. *Commissioner,* 103 F. 2d 790 (C. C. A. 9th), certiorari denied, 308 U. S. 580. Cases such as *Hirsch* v. *Commissioner,* 115 F. 2d 656 (C. C. A. 7th), and *Dallas T. & T. Warehouse Co.* v. *Commissioner,* 70 F. 2d 95 (C. C. A. 5th), cited by taxpayer (Pet. 9) (cf. also *Helvering* v. *American Dental Co.,* decided March 1, 1943, No. 303, present term), stand for the proposition that where a creditor forgives a debt, the debtor does not necessarily realize income in the amount forgiven; but certainly they do not hold that where, as here, an obligation is paid in full by the transfer of securities, the obligor can not realize taxable gain measured by the difference between the cost of the securities and the amount of the obligation or their value at time of transfer.

CONCLUSION

The decision is plainly correct; there is no conflict; the petition should be denied.

Respectfully submitted.

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